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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN,
Superintendent of Public Instruction, et al.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, et al.,
Respondents,

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

PETER J. FERRARA
Counsel of Record
JOHN ARMOR
AMERICAN CIVIL RIGHTS UNION
1220 Rosecrans St.
Suite 325
San Diego, CA 92106
(619) 222-0770
(703) 917-4247

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the Voice of America Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we seek to defend the liberty interests of parents and students in attending the school of their choice.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

SUMMARY OF ARGUMENT

The natural tendency of legal analysts is to view this case as a school aid case. But school choice programs do not arise as an attempt to provide aid to parochial or other religious schools. They stem from a wholly secular economic analysis and wholly secular political philosophies regarding freedom of choice.

At a minimum, this makes clear that the purpose behind school choice programs is not to aid or benefit religion but to advance education. But it also indicates something more. We have come pretty far afield of any soundly based notion of an establishment of religion if the courts are to strike down on establishment grounds a secular economic policy showing great promise of improving education, where religious actors and institutions merely participate on the same terms as everyone else.

The nation badly needs a broad, clear, simple rule on the constitutionality of school choice, so that it can proceed with education reform. This case is the perfect rule for establishing such a rule.

We, indeed, urge the Court to adopt the following, broad, clear, simple, two-part test for determining the constitutionality of school choice programs.

--The program, in its full context, must allow choice among the broad range of alternative accredited schools in the jurisdiction at issue, including public or private schools, and secular as well as religious schools.

--The choice is freely exercised by parents on behalf of their children (or adults on behalf of themselves) and not dictated by administrators or other government officials.

This rule follows clearly from a now well-established line of precedents of this Court. Consequently, it would be sound constitutional law while freeing the country to consider potentially highly beneficial secular education reform.

The Cleveland school choice program is not an establishment of religion either under the two-part test above or under the rule articulated in *Agostini* and reflected in other recent decisions of this Court. The Sixth Circuit below ignored *Agostini* and related recent decisions and instead relied on the outdated and clearly distinguishable *Nyquist* case. Moreover, it stumbled into a major factual error regarding the Cleveland school choice program, which actually favors secular public schools over private religious ones rather than visa versa.

ARGUMENT

I. THIS IS NOT A SCHOOL AID CASE; SCHOOL CHOICE PROGRAMS ARISE FROM WHOLLY SECULAR ECONOMIC ANALYSIS AND WHOLLY SECULAR POLITICAL PHILOSOPOHIES REGARDING FREEDOM OF CHOICE

The natural tendency of legal analysts is to view this case as a "school aid" case. The program at issue here is analyzed as an initiative to provide aid to private schools, including religious ones, and the question is whether the

program is a constitutional means of doing so. The court below analyzed the case in this way.

But this is not a school aid case. School choice programs do not arise as an attempt to provide aid to religious or other private schools.

Rather, school choice programs arise from a thoroughly secular motivation and perform a thoroughly secular function. These programs grew out of a secular economic analysis of the best means for addressing the problems of education.[2] The point of school choice is to improve education performance in part by creating competition for public schools, forcing them to improve or lose students. Choice in any event would allow parents and students to gravitate to the schools that performed the best, improving overall education results. Most importantly, low income and minority students would be able to choose schools that offered a sound education, enabling them to escape a life of poverty.

Moreover, through the resulting education marketplace, innovative new education ideas could be tried across the country on a decentralized basis. The market would then embrace those that were proven to work best. The market

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[2] *See, e.g.*, Chubb and Moe, *Politics, Markets and American Schools* (1990); Friedman, *Capitalism and Freedom* (1962); Boaz, The Public School Monopoly, in David Boaz, ed. *Liberating Schools: Education in the Inner City* (Washington, DC: Cato Institute, 1991); Hoxby, School Choice and School Productivity (Or, Could School Choice Be A Tide That Lifts All Boats?, Harvard University, forthcoming in EDUCATION NEXT, Winter 2001; Harmer, *School Choice: Why You Need It – How You Get It* (Washington, DC: Cato Institute, 1994).

would also offer a diversity of education choices to the public, allowing different parents and students to choose the school that worked best for them. As discussed in Section II, growing social science research indicates this sound economic framework may, in fact, be quite effective in improving education performance and results.

The school choice movement is also grounded in a secular political philosophy that favors freedom of choice in its own right. In this view, an education system that allows parents and students to choose their school from the full range of public and private, religious and non-religious schools is far superior for that reason alone to a system where the government assigns the student to a school that the government chooses. Through this choice, parents have much greater control over the education of their children. They can choose a school that provides the education content and methods they prefer. Moreover, because of the power of that choice, schools will be force to serve the parents' preferences and desires.

This is the rationale for school choice programs. They are not an attempt to aid religion. They really have nothing to do with religion, other than allowing the religious to participate on the same terms as everyone else. School choice programs are an economic policy, a secular tool to achieve secular results. They are an expression of a wholly secular, libertarian-oriented, political philosophy. The most prominent advocate of school choice today is Milton Friedman, a Nobel prize winning economist who first advanced the foundation for school choice decades ago.[3]

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[3] *Capitalism and Freedom, supra.*

At a minimum, this makes clear that the purpose behind school choice programs is not to aid or benefit religion. The purpose is to advance educational performance, through a framework based on sound economics, and educational freedom of choice and control for parents and students. Moreover, the primary effect of any school choice program involving the broad range of school alternatives, public and private, religious and non-religious, is not to advance religion. Rather, it is to improve education performance through a better economic policy, and enhance educational freedom.

But this analysis suggests something more. We have come pretty far afield of any soundly based notion of an establishment of religion if the courts are to strike down on establishment grounds a secular economic policy showing great promise of improving education, where religious actors and institutions merely participate along with everyone else on the same terms. Historical establishments were highly coercive and discriminatory against those who did not choose the favored religion. Striking down totally inclusive secular school choice programs on establishment grounds would not be truthful to this history. Nor would it serve any valid or defensible principle of public policy.

II. THE COURT SHOULD USE THIS CASE TO ESTABLISH A BROAD, SIMPLE, CLEAR RULE ON SCHOOL CHOICE, SO THAT THE NATION CAN PROCEED WITH EDUCATION REFORM

The nation badly needs a broad, simple, clear rule on the constitutionality of school choice, so that it can proceed with education reform. This case is the perfect vehicle for establishing such a rule.

The problem and failures of our public schools have been a central concern of policymakers all across our country for at least 20 years. An enormous amount of funding is devoted to education in the U.S. each year, over 7% of GDP, with the great majority of that spent on public education.[4] Yet, the performance of public schools in terms of academic achievement has been considered poor as measured by national and international tests, and other measures.[5] Indeed, on some international tests, U.S. students perform more poorly the longer they are in school.[6]

The problems are most acute in our nation's lowest income areas, particularly among minority students. The most recent national test results show that over half of black and Hispanic 4th graders in the U.S. cannot read at the most basic level.[7] Moreover, the gap in achievement between black and white students has been widening for almost 10

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[4] U.S. Department of Education, *Digest of Education Statistics 1998* (*http://nces.ed.gov/pubs99/digest98/d98t031.html*).

[5] See, e.g., National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000;* National Center for Education Statistics, *NAEP 1998 Reading Report Card for the Nation;* National Center for Education Statistics, *NAEP 1998 Civics Report Card for the Nation;* Frase, et al., Pursuing Excellence: A Study of U.S. Fourth-Grade Mathematics and Science Acheivement in International Context, *Findings from the Third International Mathematics and Science Study,* Office of Education Research and Improvement, U.S. Dept. of Education (1997); Bourque, et al., 1996 Science performance Standards: Achievement Results for the Nation and the States, *Findings from the National Assessment of Educational Progress,* Office of Education Research and Improvement, U.S. Dept. of Education (1997).

[6] Mulis, et al., *Mathematics and Science Achievement in the Final Year of Secondary School* (1998); Mulis et al., *Mathematics Achievement in the Primary School Years* (1997); Martin et al., *Science Achievement in the Primary School Years* (1997).

[7] National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000.*

years.[8] Low income and minority schools are also often plagued by violence, physical deterioration, high drop out rates, and drug and alcohol abuse.

To address these critical problems, a strong national movement has developed in favor of school choice programs. These programs allow parents and students to use state funds, or relief from tax payments, in various forms to finance education at the school of their choice, public or private, religious or non-religious.[9] This case involves the classic form of providing such funding – school vouchers. The rationale behind such school choice programs, the exact means by which they are to address and solve the nation's education problems, are discussed in full detail in Section II.

The school choice movement has focused on the greatest problem – failing inner city schools where many mostly minority children suffer the loss of the essential opportunity for a basic education. That focus is represented in this case, as the school choice is provided primarily to families with children in failing inner city schools in Cleveland.

The school choice experiments and programs that have been adopted are now being extensively studied across the country. These studies indicate that school choice does indeed have great potential for improving educational performance, particularly for the most vulnerable low-income and minority children.[10]

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[7] National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000.*
[8] Id.
[9] See, e.g., Rees, *School Choice: What's Happening in the States 2000.*
[10] Peterson and Hassel, eds., *Learning from School Choice* (1998); Hoxby, The Effects of Private School Vouchers on Schools and Students,

However, efforts to adopt school choice programs are bogged down all over the land in confusion over the constitutionality of such programs under the Establishment Clause. Opponents seek to stifle legislative consideration of school choice initiatives on these constitutional grounds.[11] Even those who want to support such reform are uncertain as to what is legally permissable, and are often stymied as a result.

When a school choice initiative is adopted, it is then smothered in litigation over the constitutional issues. This case is illustrative of the educational as well as administrative and financial problems this creates. Soon after adoption of the Cleveland school choice program, opponents sued in state court to stop it. In addition to the expense of defending the suit, administrators were left uncertain as to whether the program would continue and

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Program (2000); Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland (1999);* Indiana University, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program (1996-1999);* Neal, The Effects of Catholic Secondary Schooling on Educational Acheivement, 15 *Journal of Labor Economics* 98 (1997); Evans and Schwab, Do Catholic Schools Make a Difference?, *The Quarterly Journal of Economics* (1995);Coleman, Public Schools, Private Schools, and the Public Interest, 64 *The Public Interest* 1 (1981); Peterson, Myers and Howell, Harvard University Program on Education Policy and Mathematica Policy Research, *An Evaluation of the New York City School Choice Scholarship Program: The First Year* (http:/data.fas.harvard.edu/pepg/NewYork-First.htm.).
[11] See, e.g., *Commonwealth of Pa. Legis. Jrnl.*, Dec. 11, 1991, 175th Sess. at 1928, June 16, 1995, 179th Sess. at 1464.

whether they would have to scramble to make alternative educational arrangements for the students involved in it. Worst of all, uncertainty was created for parents and students in the program as to whether it would continue.

The state trial court upheld the program, but then the appellate court reversed it, stimulating further confusion and uncertainty. The Ohio Supreme Court stayed the appellate court decision and later upheld the program on Establishment Clause grounds. But it found a defect in the program under the state Constitution and required the legislature to reenact it to cure the defect.

Whereupon, the plaintiffs then sued in Federal court. Just hours before the 1999-2000 school year was to begin, they won an injunction against the program from the Federal District Court. Of course, this created havoc for administrators, students and parents. Four days later the District Court decided to let students in the program continue, and 2 months later this Court stayed the District Court injunction until a Sixth Circuit appellate decision was completed. Confusion and uncertainty among administrators, parents and students abounded.

The District Court ultimately ruled the program unconstitutional, and the Sixth Circuit affirmed. That decision is now before this Court for review, and administrators, parents, and students in Cleveland still do not know whether the program can continue, 6 years now after it has been adopted. School choice programs in Arizona, Illinois, Wisconsin and Florida have all been similarly disrupted by litigation uncertainty.

To end this confusion and uncertainty, the Court should use this case to establish a definitive, broad, simple, clear rule on the constitutionality of school choice. Legislators and other policymakers can then decide whether to adopt school choice on the merits, free of legal concerns. When school choice is adopted, it would then proceed without crippling litigation harassment. Even if the Court's rule sharply constricts school choice, policymakers would then know what they can and can't do and would be freed to consider the appropriate alternatives. In short, a definitive ruling is urgently needed so education reform can proceed.

Moreover, to achieve these results, the rule must be based on simple and clear principles. It must avoid intensively fact based issues that vary from case to case. Rules turning on how religious different schools are or what particular funds ultimately finance are prescriptions for a crippling litigation morass. The sound principles of Establishment Clause jurisprudence which have long been recognized by this Court do not require such an unworkable rule.

This case is ideal for such a broad and definitive rule. It presents a well-thought out, comprehensive school choice program based on the classic voucher concept. The program at issue here is quite representative of school choice programs advancing across the country. All state law questions have already been decided in this case by the Ohio Supreme Court. The factual record is thoroughly and completely developed. The constitutional question is as clearly framed as it is ever going to be.

We, indeed, urge the Court to adopt the following broad, simple, clear, two-part test for determining the constitutionality of school choice programs:

--The program, in its full context, must provide for choice among the broad range of alternative, accredited schools in the jurisdiction at issue, including public and private, and religious and secular schools;

--The choice is truly exercised by parents on behalf of their children (or adults on behalf of themselves), and not dictated by administrators or other government officials.

We believe this rule follows clearly from the line of this Court's cases in *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Mitchell v. Helms*, 530 U.S. 793 (2000). School choice programs in accordance with this rule would again be general secular education reform programs designed for the secular goals of improving educational performance and enhancing educational freedom of choice. They would again arise from a wholly secular economic analysis and a wholly secular political philosophy regarding freedom of choice.

Moreover, a school choice program following this rule would be strictly neutral not only between all religions, but between religion and non-religion. It would not serve to aid, benefit, advance or endorse religion. It would simply allow religious actors and institutions to participate in a general secular program on the same terms as everyone else. By providing the funding to families and then allowing them to decide how it is used, the government is simply advancing

education, and is wholly separated from any connection to religion. Any advancement of religion results from the free choice of private citizens, just as when a retiree uses part of his Social Security benefits for a contribution to his church.

Such a program also does not involve any religious coercion. Parents and students are free to avoid any religion in their education, or to choose any religiously affiliated institution they may prefer. Taxpayers are mandated only to support education in general, and any involvement with religion results only from the private choice of each individual family. As a result, taxpayers are required to provide no more benefit to religion than they do when required to support national defense, police, fire protection, and public transportation, all of which benefits the religious as well as the general public. Because the religious are merely allowed to participate in general secular school choice programs along with everyone else on equal terms, taxpayer support for such programs cannot be considered support for religion. To hold otherwise would require the exclusion of the religious from every general secular government program or activity, which would be hostility toward religion, not neutrality.

Finally, such a rule would be faithful to history, as it does not involve the highly coercive and discriminatory establishments of religion that were known at the time of the framers.

Adopting such a broad, clear, simple and definitive rule in this case would consequently be good constitutional law, and would free the country to consider potentially highly beneficial, secular education reform.

III. THE CLEVELAND SCHOOL CHOICE PROGRAM IS NOT AN ESTABLISHMENT OF RELIGION

Based on the now well-established precedents of this Court, the Cleveland school choice program cannot possibly be considered an establishment of religion.

The Cleveland school choice framework has two key features. First, it allows the broadest possible choice of schools. Parents may choose neighborhood public schools, public schools supplemented by personal tutoring financed by the voucher program, suburban public schools that may choose to participate in the voucher program, magnet schools, which are public schools that accept students without regard to neighborhood, community, or "charter", schools, which are independently run public schools, private non-religious schools, and private religious schools. Indeed, they may choose home schooling as well without any public financing. As Judge Ryan states in dissent, "It is difficult to imagine a statute that could afford it's voucher recipient's a broader spectrum of educational choice." App.51.

The second key feature is that the vouchers are provided to the parents and they then sign them over to the schools that they choose for their children. As a result, the choice among the broad array of options noted above is independently made by parents, and not dictated by administrators or other government officials.

This, of course, follows precisely the two part rule we advanced in Section II. But the program also clearly meets

the *Lemon*[12] test, as modified by *Agostini*. First, the purpose here was clearly to improve education, not to aid or benefit religion. The program arose out of a school desegregation case in Federal court in Ohio. Because of the disastrous educational performance of the Cleveland public schools, the court transferred control of the school district to the state of Ohio under a mandate to reform the system to improve performance. The school voucher program was part of the response of the state to this mandate.

Moreover, under the *Agostini* criteria, the program clearly does not have the primary effect of advancing religion. These criteria are:

> (1) whether the public financing in the program results in government indoctrination;
> (2) whether the program defines its recipients by reference to religion;
> (3) whether the government financing creates an excessive entanglement between government and religion.

521 U.S. at 234.

As Judge Ryan notes, a long line of precedents of this Court establishes that there is no indoctrination of religion where the funds go to parents and students who make a "genuinely independent and private choice" to direct their share of the funds to a particular private religious school. App. 50-51. *Mueller, Witters, Zobrest, Agostini, Mitchell.* Justice O'Connor emphasized this point in her concurring opinion in *Mitchell*, saying that when government funds flow to a religious school as a result of "independent decisions

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[12] *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

made by numerous individuals..., no reasonable observer is likely to draw from the facts...an inference that the state itself is endorsing a religious practice or belief." 120 S.Ct. at 2559.

Of course, as discussed above, this is exactly how the Cleveland school choice program works. The vouchers are provided to the parents and they make a genuinely independent and private choice to direct the funds to the school they prefer.

The Ohio voucher plan also clearly does not define its recipients by reference to religion. Recipients become eligible for the plan if they reside in the Cleveland public school district, which has been chosen for the new program because of its dismal educational performance. Those eligible are granted a first priority to participate in the program if their family income is less than 200% of the poverty line. The voucher plan also prohibits participating schools, including private, religious schools, from using any religion test for admission. Clearly, eligibility for the program is defined wholly in terms of religiously neutral, secular criteria, with no reference to religion.[13]

[13] No one in this litigation has suggested that the Ohio plan involves an excessive government entanglement with religion. Indeed, in the plan the government is kept a step away from religion, as the vouchers again go to the parents and they make their own independent choice regarding attendance at any religious school.

Therefore, the Ohio voucher plan is constitutional under *Agostini,* decided just four years ago.

The majority opinion below, however, all but ignored *Agostini*, and held that the almost 30 year old decision in *Committee for Public Educ. v. Nyquist,* 413 U.S. 756 (1973) governs this case. But that case is clearly factually distinguishable and doctrinally outdated.

What we want to emphasize, however, is that the majority below made a second major error. It factually misread the state voucher statute to discern an incentive in the program favoring private religious schools, which does not exist. The statute caps the tuition that may be charged for low income students in the program at $2,500 per year. RC[14] 3313.976(A)(8); 3313.978(A). This includes a maximum of $2,250 from the voucher and $250 paid by the student's family. This is the most that private religious schools can obtain under the program for each low-income student.

The Sixth Circuit concluded that the reason no suburban public school had agreed to participate in the voucher program was that such funding was inadequate for their cost structure. But the much leaner and cost effective private religious schools could operate under this funding limitation. Consequently, in the Court's view, the program was structured to favor participation by the private religious schools, depriving families of a true choice of schools. (App. 29).

[14] "RC" refers to the Ohio Revised Code.

But exactly contrary to the decision of the Sixth Circuit, the statutory scheme provides much more funding for the choice of public schools and is actually skewed to favor those schools over private religious schools. If a family in the Cleveland voucher program chose a suburban public school, that school would receive not only the $2,250 paid by the voucher. It would also receive the state's regular funding allocation for each student in the public schools, which was an additional $4,294 during the 2000-2001 school year. RC 3317.03(I)(1), 3327.061, 3317.08(A)(1), 3317.02(B),(N). Consequently, the suburban public schools would have received $6,544 for each voucher student they enrolled last school year, compared to $2,250 for a private religious school.

In addition, several non-religious private schools participate in the voucher program. But these schools have the additional option of registering as community, or charter, schools, an option not available to private religious schools. Community schools receive over $4,500 in funding per student each year, and offer Cleveland parents another full schooling choice. RC 3317.02(B),(N); Affidavit of Steven Puckett, para. 14; Declaration of David P. Zanotti.[15] Of course, Cleveland parents can also always choose the Cleveland public schools, which received $7,097 in state funding per student in the last school year. Id.

Finally, a low-income family that chooses a private religious school under the voucher program must pay 10% of the school's tuition up to $250 per year. All families above

[15] All nonpublished materials cited in this brief are admitted into the record.

this income level must pay still more, as the vouchers will pay only 75% of school tuition up to a maximum payment of $1,875, leaving the families responsible for all costs above that. But families pay nothing if they choose a private non-religious school in the community school program, a Cleveland public school, or a suburban public school.

Consequently, the Sixth Circuit read the statutory framework applying to the choices of parents in the Cleveland school system exactly backwards. Rather than favoring private religious schools, the statutory framework disfavors those schools. In contrast, the Ohio Supreme Court did not misread the state's statutory framework and found no incentive favoring the choice of private religious schools.

Finally, we urge the Court to consider that the Federal government has long followed the same education policy established in the Cleveland school choice program. Under the GI Bill, the Federal government has long provided education assistance for veterans to attend the school of their choice for higher education or technical training. Under that program, veterans can use federal funds to attend religious schools and even obtain religious training, like the student in *Witters* receiving funding under still another Federal education choice program.

If these programs are constitutional, and we think they clearly are, then so is the Cleveland school choice program. While these Federal programs apply to the education of adults, adults make the choice of schools in the Cleveland voucher program as well, as parents are the ones responsible for exercising the choice in that program, not their minor children. There is no Establishment Clause distinction

between adults choosing schools for their own education and adult parents choosing schools for the education of their children. The applicable Establishment Clause principles are the same in either case.

CONCLUSION

The American Civil Rights Union urges the Court to reverse the Sixth Circuit decision below and uphold the constitutionality of the Cleveland school choice case.

Respectfully Submitted,

Peter J. Ferrara
Counsel of Record
John Armor
American Civil Rights Union
1220 Rosecrans St.
Suite 325
San Diego, CA 92106
(619) 222-0770
(703) 917-4247